86-538

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

DOCKET NUMBER _____

ANN HOCKERSMITH

VERSUS

PARTNER PUBLISHING CO., INC., et al

On Appeal From the United States District Court,
Middle District of Louisiana, State of Louisiana,
Honorable Frank J. Polozola, Judge Presiding

JURISDICTIONAL STATEMENT AND APPLICATION FOR WRIT OF REVIEW AND/OR CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

ARTHUR COBB LTD
A Law Corporation
Lamar Building, Suite 3N
5551 Corporate Boulevard
Baton Rouge, LA 70808-2586
927-3956 Area Code 504

Attorney for Ann Hockersmith

QUESTIONS PRESENTED

DOES THE SEVENTH AMENDMENT PROHIBIT THE COURTS OF THE UNITED STATES FROM RE-EXAMINING THE FACTS OR THE PROBATIVE VALUE OF FACTS SUBMITTED TO A JURY?

IS THE GRANTING OF A J/nov BASED ON LACK OF EVIDENCE AN EVIDENTIARY FACTUAL FINDING PROHIBITED BY THE SEVENTH AMENDMENT?

CAN J/nov BE GRANTED ON A FACTUAL ISSUE WITHOUT CONTRAVENING THE SEVENTH AMENDMENT?

LIST OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

Ann Hockersmith, Plaintiff
Arthur Cobb, Attorney for Plaintiff

Publishers Distributing Corporation, Inc., defendant

Flynt Distributing Company, defendant

LFP, Inc.

Hustler Magazine, Inc.

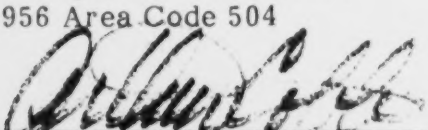
Chic Magazine, Inc.

R. Bruce MacMurdo, Attorney for Publishers and Flynt
10311 Jefferson Hwy., Suite 2 C/D
Baton Rouge, LA 70809

Partner Publishing Co., Inc., defendant

Piccadilly Publication, Inc., defendant

By Attorney for Plaintiff
ARTHUR COBB LTD
A Law Corporation
Lamar Building, Suite 3N
5551 Corporate Boulevard
Baton Rouge, LA 70808-2586
927-3956 Area Code 504



ARTHUR COBB, Trial Attorney

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LOWER COURT ACTION

The jury awarded plaintiff $400,000. The Trial Court granted J/nov based on "lack of evidence" and the Fifth Circuit affirmed.

JURISDICTIONAL GROUNDS IN THIS COURT

The Judgment of the Fifth Circuit is dated 23 May 1986. The time of entry is 23 May 1986. The Statutory Provisions granting jurisdiction in this Court are:

28 USC 2101(c):

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Seventh Amendment:

> AMENDMENT [VII.]
>
> Civil trials
>
> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Supreme Court Rule 17(1)(a):

> Rule 17. Considerations governing review on certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important rea-

sons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

When plaintiff, Ann Hockersmith, was 18 years old, supporting herself and living alone in Florida, she answered a newspaper ad seeking Playboy magazine models. The ad was run by Stuart Citrin. After an initial interview and photography test, Citrin selected Annie and later photographed her on two separate occasions. Annie testified she wrote the words "For Playboy Use Only" on the standard model release form and then signed her name and address on the release. She testified she was not paid anything for the photograph sessions, nor was she given a copy of the photographs taken by Citrin. After the two sessions, there was no further contact between Annie and Citrin.

Later, when she was 21, and on her own initiative, Annie submitted her own photographs to Penthouse Magazine and she was selected to be the cover girl and centerfold model for

the April 1980 issue of Penthouse Magazine. She was quite thrilled with her accomplishment. Besides the $4,000 monetary reward for being a centerfold model, Annie was flown to New York twice and to Brazil, and was now in the running for the lucrative "Pet of the Year" competition sponsored by Penthouse Magazine. Because she was a centerfold model, Annie was one of only twelve models in that competition. The 1980 "Pet of the Year" would receive $250,000 in cash and gifts, an all-expense paid trip around the world, plus a year's salary from the Penthouse Corporation for promotional work. The title "Pet of the Year" is often a springboard for work in motion pictures, television, and public relations. Annie testified she had an oral agreement with Penthouse not to model for any other magazines while she was modeling for Penthouse.

After the April 1980 Penthouse issue was released, the November 1980 issue of Partner Magazine published the photographs of Annie taken by Citrin. Partner Magazine is owned by Partner Publishing Company, Inc. and is distributed by Publishers Distributing Corporation, Inc. which in turn is owned by Flynt Distributing Company, Inc.

The article published in Partner Magazine published Annie's real name and address, referred to her as "our girl", implied she was bisexual, and quoted several men fantasizing what they would do to her. No one associated with Partner Magazine, its publishers or its distributors ever contacted her, asked for her consent to the publication of her photographs, or offered to compensate her in any way, or even informed her that her photographs and the made-up stories about her were used in their magazine.

Approximately one year later, Piccadilly Publication, Inc. published the November 1981 issue of Game Magazine, which also featured the Citrin photographs of Annie. Game used her photographs, called her "Martine" in the article accompanying the pictorial, and quoted "Martine" as a sexual deviant who had an incestuous relationship with her father. No one at Piccadilly Publishing or Game Magazine contacted Annie, sought her consent to use her photographs, or compensated her in any way, or even informed her that her photographs and the made-up stories about her were used in their magazine.

Flynt Distributing Company, Inc. also distributes Game Magazine. The November 1980 issue of Partner sold 338,895

copies at $2.95 per copy. The November 1981 issue of Game sold 216,475 copies at $2.95 per copy.

The Seventh Amendment to the Constitution of the United States prohibits Courts of the United States from re-examining any **fact** found by the jury. When a trial Judge grants a J/nov **based** on "lack of evidence", the trial Judge is re-examining the facts. J/nov can be granted only as to **legal** issues.

Plaintiff sued on defamation, invasion of privacy, and the unauthorized use of her publicity. The jury found that plaintiff had been defamed and her privacy invaded and that defendants were malicious, and awarded her $400,000. The Trial Court granted J/nov based on lack of evidence. The Fifth Circuit Court of Appeals affirmed. Such action by the District Court and the Fifth Circuit Court of Appeals violated her Constitutional rights because the Seventh Amendment prohibits the courts of the United States from re-examining the **facts** or the probative value of facts. Granting J/nov based on "lack of evidence" is an evidentiary **factual** finding and is prohibited by the Seventh Amendment.

FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

28 USC 1332(a)(1):

> § 1332. Diversity of citizenship; amount in controversy; costs
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;

ARGUMENT

This case involves the granting of a motion for J/nov by the trial court judge pursuant to FRCP 50(b). The Fifth Circuit Court of Appeals affirmed. The majority of the jurisprudence supports this action as being properly within the province of the trial court, for such reasons as the trial judge's personal observations, proximity to the issues at hand, etc. In addition, case law does not deprive courts of the power to grant J/nov's for the necessity of preserving justice. There is, however, an equally strong argument suggesting that trial judges operate under strict limitations when granting a J/nov and are not to be quick to tamper with the jury's verdict. See **Metrocare v. Washington**, 679 F.2d 922; **Fireman's v. Videfreeze**, 68 FRD 484; **Treadway v. Brunswick**, 364 F.Supp. 316; and **LaBuff v. Texas**, 126 F.Supp. 759.

FRCP 50(b) was never meant to contravene the Seventh Amendment since FRCP 50(b) itself states, "...a

determination of the **legal** questions raised by the motion..." FRCP 50 is applicable only to **legal** issues and not **factual** issues.

Also, the Seventh Amendment acts as a check on the courts' power to vacate awards. See **Dunn v. Sears**, 639 F.2d 1171 and **Lucas v. American**, 630 F.2d 291; and prohibits a re-examination of the facts found by the jury. See **Lehrman v. Gulf**, 464 F.2d 26; **Wood v. Diamond**, 691 F.2d 1165; and **Atlantic v. Gulf**, 82 S.Ct. 780. A new trial is preferable to tampering with the jury's verdict. See 1912 opinion of **Slocum v. New York**, 33 S.Ct. 523, in which holding to that effect has never been overruled despite attempts to do so in **Aetna v. Kennedy**, 57 S.Ct. 809.

The Supreme Court's adoption of the Federal Rules of Civil Procedure seems to co-exist in direct contradiction of its pronouncements on the constitutional rights of litigants, especially in the case of one's Seventh Amendment rights versus the efficiency and expediency of J/nov's and their similar motions of directed vedicts and summary judgments. In certain types of cases, the Court will ensure Seventh Amendment protection, as can be seen in the FELA and Jones Act cases. See **Lavender v. Kurn**, 327 U.S. 645, 66 S.Ct. 740

(1946), where the court will reverse the District Court if the judge takes away from the province of the jury. These cases seem to be sui generis, however, as special statutes buttress the plaintiff's jury trial rights and therefore the rules that apply in these types of cases have not been applied across the board.

The Supreme Court has most recently upheld the constitutionality of Rule 50(b) in the 1967 case of **Neely v. Martin**, 87 S.Ct. 1072 (1967), citing **Montgomery v. Duncan**, 61 S.Ct. 189, (1940) for the proposition that Rule 50(b) does not violate one's Seventh Amendment right to a jury trial. The court seems quite protective of the Federal Rules yet is also adamant about the restraint that judges must exercise. **Connell v. Sears**, 722 F.2d 1542 (Fed. Cir. 1983), lists certain guidelines that courts must follow in order to avoid Seventh Amendment problems.

In addition, some case law outlining the progressive gains made by federal court judges over the state courts' powers might prove helpful (the elimination of the state court standard of "scintilla of evidence", replaced by the somewhat flaky "reasonable man" test of the federal courts, and the application of federal standards as opposed to state court

standards in diversity jurisdiction cases) in demonstrating the federal judges' abuse of their right to grant a J/nov.

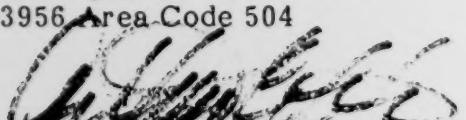
CONCLUSION

It is extremely important that the right to trial by jury remain inviolate.

The Seventh Amendment is a **prohibition** against **Judges** and holds down the authority and power of the **Judges**, yet it is the very same **judges** who interpret the Seventh Amendment and who are **reluctant** to tie their own hands with the provisions of the Seventh Amendment. These Judges have found ways to read FRCP 50 in such a way as to allow "re-examination" of the **facts** presented to the Jury. Rule 50 allows J/nov as a matter of law only - otherwise, it would contravene the Seventh Amendment.

Here, the District Court and the Fifth Circuit Court of Appeals has so far sanctioned such a departure from the true meaning of the prohibition in the Seventh Amendment that such a departure (J/nov **on facts**) conflicts with a Constitutional Amendment and this Court is called upon to exercise its power of supervision.

Respectfully Submitted:
ARTHUR COBB LTD
A Law Corporation
5551 Corporate Blvd., Suite 3N
Baton Rouge, LA 70808-2586
927-3956 Area Code 504



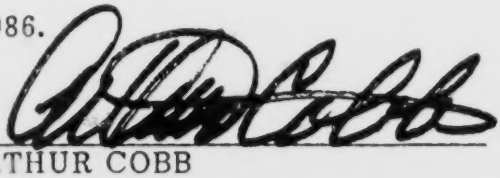
ARTHUR COBB, Trial Attorney

CERTIFICATE AND VERIFICATION

STATE OF LOUISIANA

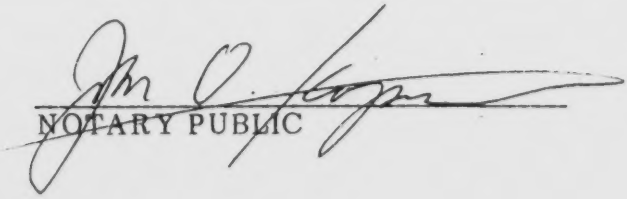
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared ARTHUR COBB, who, after first being duly sworn by me, did depose and say that the allegations of the Petition for Writ of Review and/or Certiorari are true and correct to the best of his knowledge, information and belief, and that three copies of the same has been mailed to R. Bruce MacMurdo on 9 September 1986.



ARTHUR COBB

SWORN TO AND SUBSCRIBED before me on 9 September 1986.



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